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IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON THE MERITS FOR PETITIONERS

GRAYDON DEAN LUTHEY, JR.
Counsel of Record
STEPHEN W. RAY
KERI G. WILLIAMS
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue
Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

BOB W. RABON
RABON, WOLF & RABON
402 East Jackson
P.O. Box 726
Hugo, OK 74743
(580) 326-6427

DENNIS W. ARROW
OKLAHOMA CITY
UNIVERSITY SCHOOL
OF LAW
2501 North Blackwelder
Oklahoma City, OK 73106
(405) 521-5179

Attorneys for Petitioners

166269

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, under the applicable Indian-law canons of statutory construction, the Indian Gaming Regulatory Act, by 25 U.S.C. § 2719(d)(1)'s express incorporation of Chapter 35 of the Internal Revenue Code, confers on Indian tribes conducting gaming operations the same exemption from wagering taxes afforded to states by Chapter 35 of the Internal Revenue Code?

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Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000), Appendix to Petition for Certiorari ("App."), p. 1a.

Choctaw Nation of Oklahoma v. United States, 210 F.3d 389 (10th Cir. 2000), App. p. 29a.

Choctaw Nation of Oklahoma v. United States, 1999 WL 282779 (E.D. Okla. 1999), App. p. 33a.

Chickasaw Nation v. United States, 1998 WL 975690 (E.D. Okla. 1998), App. p. 47a.

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The judgments for which review is sought were entered on April 5, 2000. The petitions for rehearing and suggestions for rehearing *en banc* were denied on July 5, 2000. (App. p. 66a.) The Petition was filed on October 2, 2000 within the time allowed by law. 28 U.S.C. § 2101(c); Supreme Court Rule 13.3. Jurisdiction is based on 28 U.S.C. § 1254(1).

CITATION TO STATUTES INVOLVED IN THE CASE

25 U.S.C. § 2701 (1994)
25 U.S.C. § 2702 (1994)
25 U.S.C. § 2710 (1994)
25 U.S.C. § 2719(d)(1) (1994)
26 U.S.C. § 4401 (1994)
26 U.S.C. § 4402 (1994)
26 U.S.C. § 4403 (1994)
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26 U.S.C. § 4424 (1994)

(Statutory text set out in App. p. 68a, *et seq.*)

STATEMENT OF THE CASE

The Chickasaw Nation and the Choctaw Nation of Oklahoma [the "Nations"], sovereign, federally-recognized Indian Tribes, separately conduct pull-tab games pursuant to the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2485 (1988) (codified at 25 U.S.C. § 2701, *et seq.*) ["IGRA"], and their own respective tribal ordinances. Those games are conducted exclusively on trust lands at facilities operated by the respective Nations. As required by 25 U.S.C. § 2710(b)(2)(B), the tribal revenues from those operations are used exclusively for the respective Nations' governmental functions, consisting of legislative branch expenses, judicial branch expenses and executive branch expenses, including tribal nutritional, medical, educational and senior citizen programs. No tribal member of either Nation owns an interest in the particular Nation's gaming operations or is entitled to receive direct payment from the net revenues of those operations.

The Internal Revenue Service assessed federal wagering and related occupational taxes pursuant to Internal Revenue Code ["IRC"] Chapter 35, 26 U.S.C. §§ 4401 and 4411 (1994), against the Nations in connection with their pull-tab operations.

After satisfying the administrative prerequisites for a refund action, each Nation filed its separate action against the United States [the "Government"] for a refund pursuant to 28 U.S.C. § 1346(a)(1) (1994) in the United States District Court for the Eastern District of Oklahoma, seeking recovery of the wagering taxes paid for the month of July 1993, plus interest; occupational taxes for the year 1993, plus interest; and reasonable litigation costs authorized by 26 U.S.C. § 7430(a) (1994). Each Nation alleged that the taxes were erroneously and illegally assessed and collected. The Government denied in each case that the taxes in question were erroneously and illegally assessed and collected. In each case, the Government also counterclaimed for unpaid wagering and occupational tax

assessments, plus interest for periods additional to those addressed in the complaints. The Nations denied liability and alleged that the taxes assessed were illegal as applied to them.

The merits in each case were addressed by cross motions for summary judgment. In each action, the district court then entered judgment against the particular Nation and in favor of the Government.

The Nations separately appealed to the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit affirmed the district court's judgments. The court of appeals addressed the question of whether the reference to IRC Chapter 35 in 25 U.S.C. § 2719(d) provides to tribes the same federal gaming tax exemption afforded by IRC Chapter 35 to state governmental gaming.[1] The Tenth

1. Section 20(d)(1) of the Indian Gaming Regulatory Act, 102 Stat. 2486 (1998) (codified at 25 U.S.C. § 2719(d)(1)), provides:

> **(d) Application of Internal Revenue Code of 1986**
>
> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State and wagering operations.
>
> * * *

IRC Chapter 35 contains 26 U.S.C. § 4402(3) (1994), which provides:

> **§ 4402. Exemptions.**
>
> No tax shall be imposed by this subchapter
>
> **(3) State-conducted lotteries, etc.**
>
> On any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

Circuit characterized the relevant provision of § 2719(d)(1) as "cryptic;" did not apply any test for determining the existence of an ambiguity; implicitly (if not expressly) recognized an ambiguity; neither invoked nor applied the relevant Indian-law canon of construction (requiring statutory ambiguity to be liberally interpreted to the Indians' benefit) to § 2719(d)(1); construed the provision against the tribal interests; and stated in its Opinion in the *Chickasaw* appeal[2]:

> Although it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definition of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Chickasaw, 208 F.3d at 883-84.

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2. In the *Choctaw* appeal, rather than issuing an opinion, the Court of Appeals issued a four-page Order and Judgment that adopted by reference the Opinion in the companion *Chickasaw* case and affirmed the District Court judgment in favor of the Government. *See Choctaw Nation of Oklahoma v. United States*, 210 F.3d 389 (10th Cir. 2000).

Nineteen days after *Chickasaw* was handed down, the United States Court of Appeals for the Federal Circuit issued its Opinion in *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000) (App. p. 101a.). That case, an appeal from cross motions for summary judgment that were resolved in favor of the Government, presented the same 25 U.S.C. § 2719(d)(1) tribal government wagering-tax-exemption issue addressed in *Chickasaw*. In *Little Six*, the Federal Circuit began its analysis with the language of IGRA, and explained:

> We agree with Little Six that, although wagers placed on Indian pull-tab games are subject to taxation under I.R.C. §§ 4401 and 4411, Indian tribes are nevertheless exempt from such taxes under 25 U.S.C. § 2719(d)(1). Again, we begin with the language of the relevant statutes. Section 2719(d)(1) provides in relevant part that:
>
> > The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, 6050I, *and chapter 35 of such Code)* concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter . . . *in the same manner as such provisions apply to state gaming and wagering operations.*
>
> 25 U.S.C. § 2719(d)(1) (emphasis added). Thus, chapter 35 of the Internal Revenue Code applies to Indian gaming in the same manner as it does to state gaming. Section 4402(3), which is found in chapter 35 of the Internal Revenue Code, provides an express exemption for "any wager placed in a sweepstakes, wagering pool or lottery which is conducted by an agency of a State acting under the authority of State

> law." I.R.C. § 4403(3). Accordingly, section 2719(d)(1) can reasonably be construed as providing a tax exemption for wagers placed on lotteries and pull-tab games conducted by Indian tribes, because chapter 35 of the Internal Revenue Code provides such an exemption to state gaming operations.

Little Six, 210 F.3d at 1365. Aware of the Tenth Circuit's *Chickasaw* Opinion three weeks earlier, the Federal Circuit in *Little Six* rejected its reasoning:

> The government argues that Little Six is not exempt from wagering taxes, because section 2719(d)(1) only applies to those tax provisions that concern "the reporting and withholding of taxes [from] winnings." 25 U.S.C. § 2719(d)(1). However, in construing a statute we must give effect and meaning to all of its terms if possible. *See Bailey v. United States*, 516 U.S. 137, 145 . . . (1955). While section 2719(d)(1) does contain the language cited by the government, it also explicitly refers to section 6050I and chapter 35 of the Internal Revenue Code, which clearly do not relate to "winnings." *See* I.R.C. § 6050I (returns relating to cash received in trade or business); I.R.C. §§ 4401-4405 (chapter 35) (taxes on wagering). Thus, the interpretation proposed by the government would render language in the statute superfluous, a result that we must attempt to avoid.

Id.

The Federal Circuit applied an "inconsistency between portions of the same statute" test for the existence of an ambiguity and found the particular provision, labeled by the Tenth Circuit as "cryptic," to be an ambiguity that, under this Court's controlling precedent, must be resolved in favor of the tribal interests:

> In view of the inconsistency between the statute's reference to winnings and its reference to § 6050I and chapter 35 of the Internal Revenue Code, we conclude that the language in § 2719(d)(1) is ambiguous. Little Six argues that, to the extent the statute is ambiguous, the Indian canon of construction requires section 2719(d)(1) to be construed in their favor. We agree. As stated by the Supreme Court, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 . . . (1985).

Id. at 1365.

The Federal Circuit ended that portion of its Opinion with a footnote directly criticizing the *Chickasaw* Opinion giving rise to the judgments that Petitioners seek to have reversed here:

> We note that the Tenth Circuit has recently held that 25 U.S.C. § 2719(d) does not provide tribes with the same exemption from federal wagering excise taxes enjoyed by the states. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000). We do not agree. The Tenth Circuit did not discuss the Indian canon of construction, which we believe fully applies here.

Little Six, 210 F.3d at 1365 n.2.

The *Little Six* Court concluded its statutory examination with language that contradicts the Tenth Circuit's reasoning that "[h]ad Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption." *Chickasaw*, 208 F.3d at 884. The Federal Circuit explained:

> In the present case, having determined that the language of section 2719(d)(1) is ambiguous and can reasonably be construed as exempting Indian pull-tab games from the taxes at issue, we conclude

> that *Cook* [*v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996)] is inapposite. Moreover, the Supreme Court has held that, "although tax exemptions generally are to be construed narrowly, in 'the Government's dealing with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.' " *Montana* [*v. Blackfeet Tribe*,] 471 U.S. [759,] at 766, n.4 [(1985)] . . . (citing *Choate v. Trapp*, 224 U.S. 665, 675 . . . (1912)). We therefore conclude that section 2719(d)(1) should be construed in favor of Little Six. The Court of Federal Claims erred in granting the government's motion for summary judgment and abused its discretion in denying Little Six's motion for summary judgment.

Little Six, 210 F.3d at 1366.

Subsequent to the *Little Six* decision, the Petitioner Nations here sought rehearing, suggested rehearing *en banc*, and called to the Tenth Circuit's attention the express Federal Circuit criticism in *Little Six* of the Tenth Circuit panel's reasoning in *Chickasaw*. After ordering a response brief from the Government, the Tenth Circuit denied rehearing without comment.[3]

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3. After denial of the petition for rehearing by the Tenth Circuit, the rehearing *en banc* sought by the Government in *Little Six* was denied, with three judges dissenting from that denial. *Little Six, Inc. v. United States*, 229 F.3d 1383 (Fed. Cir. 2000). That dissent suggested relegating the Indian-law canon to the back of the line of tools of construction:

> However, in my view, the panel should not have invoked the Indian-law canon of construction so quickly. Instead, it should have utilized all available tools of statutory construction before declaring the statute ambiguous and resorting to a default rule designed for exceptional cases where, despite the court's best efforts, an ambiguity in the statute remains.

Id. at 1384 (Dyk, J., dissenting).

(Cont'd)

The Petitioner Nations sought a Writ of Certiorari to the Court of Appeals for the Tenth Circuit to resolve the conflict between two United States Courts of Appeals on the important matter of whether 25 U.S.C. § 2719(d)(1)'s express incorporation of Chapter 35 of the IRC confers on Indian tribes the same exemption from wagering taxes afforded to states by that chapter. The Respondent acquiesced in the Petition for Certiorari and urged this Court to grant the Petition. Brief for Respondent United States of America, Dec. 26, 2000, at p. 6. On January 22, 2001, this Court granted the Petition.

SUMMARY OF THE ARGUMENT

This Court uses a long-held principle deeply rooted in jurisprudence to resolve textual ambiguities in Indian-law statutes. Between two possible constructions, this Court chooses the liberal construction that benefits the interests of the Indians. Since the trust relationship between the United States and the Indian tribes on which the Indian-law canons are grounded has

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(Cont'd)

Nevertheless, that dissent agreed with the majority in rejecting the Government's argument (embraced by the Tenth Circuit) that the reference to Chapter 35 was designed to incorporate the definitions in 26 U.S.C. § 4421 (1994) of wagers and lotteries:

> I do not find persuasive the government's argument (adopted by the United States Court of Appeals for the Tenth Circuit) that the reference to chapter 35 was designed to incorporate § 4421's definitions of wagers and lotteries. *See Chickasaw Nation*, 208 F.3d at 883; 26 U.S.C. § 4421. For example, chapter 35 itself explicitly states that its definitions of wagers and lotteries apply only "for purposes of [chapter 35]," 26 U.S.C. § 4421, and its definitions are thus irrelevant for purposes of the other sections of the Code referenced by § 2719(d).

Id. (Dyk, J., dissenting).

The dissent refused to apply the Indian-law canon and concluded that the express reference to Chapter 35 should be read out of § 2719(d)(1) as superfluous. *Id.* at 1386. (Dyk, J., dissenting).

not changed, the Indian-law canons remain eminently sound and vital. In particular, this Court has applied the Indian-law canons to resolve statutory ambiguities concerning claimed exemptions from both direct federal taxation and the federal authorization of state taxes without distinction. That application has occurred in the face of the general maxim that tax exemptions are to be strictly construed.

In no case involving the construction of an actual statutory ambiguity, on the basis of which Indians have asserted a tax exemption, has this Court held that the general tax-exemption maxim supersedes the Indian-law canons of construction and results in a narrow construction against the Indians. The Indian tax-exemption cases in which this Court has, in *dicta*, referenced the general tax-exemption maxim neither included textual ambiguity, actually resulted in construction, nor even mentioned the Indian canons. Rather, those cases stand as support for the general proposition that tax exemptions are not to be implied from pure policy untethered to statutory text.

25 U.S.C. § 2719(d)(1) contains an ambiguity as to whether tribal governmental gaming enjoys the same exemption from federal wagering taxes as is provided to state governmental gaming operators by IRC Chapter 35. Section 2719(d)(1), as finally enacted, includes an express reference to IRC Chapter 35, albeit in a phrase of § 2719(d)(1) concerning the reporting and withholding of third-party winnings. Chapter 35, however, has nothing to do with the reporting or withholding of taxes with respect to winnings by third parties. All appellate judges who have addressed § 2719(d)(1), regardless of their ultimate view on the availability of the tax exemption to Indian tribes engaged in governmental gaming, have either expressly or implicitly acknowledged the facial ambiguity of the statute.

The legislative history does not clearly indicate that Congress intended for tribal governmental gaming to be treated differently than state governmental gaming. S. 555, § 20(d),100th Cong. (Feb. 19, 1987), which ultimately became IGRA,

did initially make clear that the IRC provisions concerning taxation (and implicitly, tax exemptions) applicable to state governmental gaming would apply to tribal government gaming. Although the phrase including "taxation" was deleted from S. 555, it was not replaced with silence. Rather, the general "taxation" phrase was contemporaneously replaced by language that included the specific reference to the exemption-granting IRC Chapter 35. The Senate Committee Report and the congressional floor debate are silent as to the reason for that specific substitution. This is not a case of simple deletion, in which congressional intent might be rather strongly inferred from subsequent silence.

Application of the Indian-law canons of construction should result in a liberal construction of the facial statutory ambiguity in § 2719(d)(1) in favor of the tax exemption. Failure to so construe the *patent* ambiguity in that provision would: (a) violate congressional intent that the Indian-law canon on statutory ambiguity apply to IGRA; (b) constitute the practical demise of that eminently sound and vital canon by destroying its long-held primacy and relegating it to the back of the line of tools of construction; and (c) constitute fundamental federal Indian policy adverse to Indian tribes without clear, supporting congressional direction.

Application of the Indian-law canons and the resulting construction in favor of the equality of federal tax treatment of tribal gaming with state gaming will further the federal Indian policy embodied in IGRA of advancing tribal governmental gaming to provide governmental revenue for tribal members' services. Such a construction is inconsistent neither with any clear language in § 2719(d)(1) (or for that matter, any other IGRA provision), nor with any clear legislative history concerning that statute. That construction advances the federal Indian policy of using governmental gaming to raise tribal revenue for member services, thereby helping to break the debilitating cycle of tribal dependency on congressional appropriations.

Application of the Indian-law canons also results in a construction consistent with the legislative indication (from the Senate Committee Report) that tribal governmental gaming to raise revenue for governmental purposes is the same type of activity as governmental gaming conducted by state competitors of tribes. Construction in favor of the exemption places tribal governmental gaming on the same tax footing as state governmental gaming.

A construction of the textual ambiguity in favor of the availability to tribes of the state wagering tax exemption is also consistent with the views of IGRA's primary author, Senator Daniel Inouye, whose views (at a minimum) demonstrate that the pro-tribal construction is clearly a "possible construction" of the ambiguity. Petitioner Nations therefore urge this Court to adopt their proffered construction of § 2719(d)(1) as the necessary resolution of the statutory ambiguity under the Indian-law canons of construction.

ARGUMENT

PROPOSITION ONE

EVEN IN CASES IN WHICH A FEDERAL TAX EXEMPTION IS IN ISSUE, THE INDIAN-LAW CANONS OF CONSTRUCTION MANDATE CONSTRUCTION OF TEXTUALLY-AMBIGUOUS INDIAN-LAW-RELATED FEDERAL STATUTES BROADLY IN THE MANNER MOST FAVORABLE TO TRIBAL INTERESTS, ABSENT CLEAR LEGISLATIVE HISTORY SUPPORTING A CONTRARY CONCLUSION.

A. AN AMBIGUITY IN AN INDIAN-LAW- RELATED FEDERAL STATUTE IS TO BE LIBERALLY CONSTRUED IN FAVOR OF TRIBAL INTERESTS.

This Court has clearly articulated the method for resolving ambiguity in federal statutes affecting Indians:

> When we are faced with these **two possible constructions,** our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S., at 766 . . . *See also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. [164], at 174 [(1973)].

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (emphasis added).

The Indian-law canons reflect a specific, historically-based judicial perspective:

> This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians. . . .

South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 520 (1986) (Blackmun, J., dissenting).

Fundamental policy based on the relation of the United States to Indian tribes undergirds the Indian-law canons of statutory construction:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

That unique trust relationship between the United States and the Petitioner Nations here has not been abrogated. The Indian-law canons based upon that trust relationship

therefore remain "eminently sound and vital," *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

B. THE LEGISLATIVE HISTORY OF IGRA COUNSELS THAT THE INDIAN-LAW CANONS OF CONSTRUCTION ARE TO BE USED TO RESOLVE AMBIGUITIES IN THAT ACT.

When it enacted IGRA, Congress not merely presumptively,[4] but actually knew of this Court's longstanding Indian-law canons of construction. The Senate Select Committee on Indian Affairs expressly stated its desire that those canons be applied to resolve in favor of Indian tribes various ambiguities in IGRA arising in suits over compact negotiations:

> The Committee recognizes that this may include issues of a very general nature and, and [sic] course trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for 150 years in deciding cases involving Indian tribes.

S. Rep. No. 100-446, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085. Having both demonstrated certain knowledge of this Court's Indian-law canons and expressed a preference for their application to ambiguities in IGRA concerning compact negotiations, it is inconceivable that Congress did not also intend for the Indian-law canons to apply to IGRA *in toto*.

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4. *See generally McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction. . . .").

C. IN CONSTRUING IN FAVOR OF INDIAN INTERESTS AMBIGUOUS FEDERAL STATUTES AFFECTING TAX EXEMPTIONS, THIS COURT HAS AFFORDED THE INDIAN-LAW CANONS PRECEDENCE OVER THE GENERAL TAX-EXEMPTION MAXIM.

In *Choate v. Trapp*, 224 U.S. 665 (1912), a case involving a tax exemption claimed by Indians, this Court was confronted by the general tax-exemption maxim that tax exemptions should be strictly construed.[5] This Court noted that in the Government's dealing with Indians, because of the special relationship, the general tax-exemption maxim

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5. Only a few years before *Choate*, this Court explained the relatively weak office of the general tax-exemption maxim and indicated that its true effectiveness is as a last, rather than a first, resort:

> *We recognize the force and salutory character of the rule, but it must not be misunderstood. It is not a substitute for all other rules.* It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. *Its proper office is to help solve ambiguities, not to compel an immediate surrender to them – to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute.*

Citizens Bank v. Parker, 192 U.S. 73, 85-86 (1904) (emphasis added).

does not apply and the construction is to be liberal in favor of the Indians. *Id.* at 675. This Court then explained:

> This rule of construction has been recognized, without exception for more than a hundred years, and has been applied in tax cases.

Id.

This Court has recognized *Choate's* teaching – that the specific Indian-law statutory-ambiguity canon supersedes the general tax-exemption maxim – in a number of cases involving federal legislation. Most recently, in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), this Court resolved in favor of the Indian tribe the question of whether a state may tax the tribe's royalty interests for leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. § 396(a) *et seq.* [the 1938 Act]. The Act of May 29, 1924, ch. 210, 43 Stat. 242, 25 U.S.C. § 398 *et seq.* [the 1924 Act] authorized mineral leasing of unallotted lands, and state taxation of the oil and gas production. The 1938 Act, which permitted the mineral leasing of unallotted lands and detailed uniform leasing procedures designed to protect the Indians, did not contain a provision authorizing state taxation, nor did it specifically repeal the tax authorization of the 1924 Act. Rather, the 1938 Act contained a general repealer provision stating that "[a]ll Act [sic] or parts of Acts inconsistent herewith are hereby repealed." 471 U.S. at 764.

In determining the question by statutory construction in favor of the tribe, this Court observed that the state failed to appreciate that the standard principles of statutory construction do not have their usual force in cases involving Indian law. *See id.* at 766. After explaining the reason for the Indian canons, identifying an Indian-law canon specifically applicable to federal-authorization-of-state-taxation issues (not applicable in this case), and setting forth

the canon that "statutes should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *id.*, this Court then noted:

> Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, "in the Government's dealing with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal . . ." *Choate v. Trapp*, 224 U.S., at 675.

Blackfeet Tribe, 471 U.S. at 766 n.4.

Although this Court used an Indian-law canon specifically applicable to the federal-authorization-of-state-taxation issue to justify in part its decision in *Blackfeet Tribe*,[6] it also made clear that the Indian canon requiring that statutory ambiguity be construed in favor of tribal interests provided grounds to reject the state's claim that no tax exemption existed:

> The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. **Nor would the state's interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians.**

Blackfeet Tribe, 471 U.S. at 767 (emphasis added).

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6. Two such canons are directly applicable in this case: First, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e.g.*, *Bryan v. Itasca County*, *supra*, 426 U.S. at 393; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Blackfeet Tribe, 471 U.S. at 766 (emphasis added).

This Court's decision in *Squire v. Capoeman*, 351 U.S. 1 (1956), is particularly germane to the application of the Indian-law canons herein, since that case also dealt with an asserted federal-statute-based immunity from *federal* taxation. In *Squire*, this Court found statutory ambiguity, resolved it in favor of Indians and consequently recognized an exemption from direct federal taxation. At the outset, this Court rejected the very approach proffered to date by the Government in this litigation. *Cf.* at 5-6 ("[T]he Government urged us to view this case as an ordinary tax case without regard to the . . . relevant statutes, congressional policy concerning Indians, or the guardian-ward relationship between the United States and these particular Indians."). This Court then acknowledged the general maxim that tax exemptions should be clearly expressed. *Id.* ("We also agree that, to be valid, exemptions to tax laws should be clearly expressed."). Next, this Court also noted that the statutory provision on which the Indians based their exemption did not unequivocally provide for non-taxability. *Id.* ("[A]lthough this statutory provision is not expressly couched in terms of non-taxability . . ."). Most importantly, after stating the general tax-exemption maxim and acknowledging that the statutory provision did not unambiguously establish a tax exemption, this Court invoked the Indian-law canons of construction:

> [D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and in good faith. Hence, in the words of Chief Justice Marshall, "the language used in treaties with the Indians should never be construed to their prejudice . . .".

Id. at 6-7 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Finally, the *Squire* Court quoted a 1925 opinion of the Attorney General that had earlier found a tax exemption (even without a clear statutory basis for the exemption) and

had set forth a portion of federal Indian policy manifestly relevant to this case:

> . . . In other words, it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian.

Squire, 351 U.S. at 8.[7]

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), demonstrates the continuing vitality of *Squire*. In addressing the statute under which the exemption at issue was claimed, this Court acknowledged the general tax-exemption maxim, invoked *Squire*, and illustrated how asserted Indian tax exemptions should be evaluated in the presence of federal statutory ambiguity:

> Nor is the Arizona Enabling Act [of June 20, 1910, ch. 310, 36 Stat. 557,] silent on the specific question of tax immunity. The Act expressly provides that "nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property *outside of an Indian reservation* owned or held by any Indian." *Id.*, at 570 (emphasis added). **It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as providing a tax exemption for Indians. *See*, *e.g.*, *Squire v. Capoeman*, 351 U.S. 1, 6 (1956),** and we see no reason to give this language an especially crabbed or restrictive meaning.

411 U.S. at 175-76 (bold emphasis added).

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7. 34 Op. Atty. Gen. 439, 445 (1925). This Court also articulated that principle without attribution in *Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418, 420 (1935).

McClanahan has additional relevance to this case for several reasons. Initially, the *McClanahan* Court clearly recognized that the Indian-law canons of construction supersede the general tax-exemption maxim where both might otherwise theoretically apply. Second, it reasserted the general nature of the tax-exemption maxim, and, by so doing, indicated that general maxim's subservience to the specific Indian-law canon on statutory ambiguity. Third, by comparing the ambiguity of the Arizona Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, at 570, to the statute at issue in *Squire* (and labeling the *Squire* statute "far more ambiguous"), *McClanahan*, 411 U.S. at 175-76, this Court demonstrated that the application of the Indian-law statutory-ambiguity canon is not dependent upon a specific *degree* of statutory ambiguity. Finally, *McClanahan*'s use of the *federal* tax exemption *Squire* opinion in a case of asserted exemption from *state* taxation confirms that the primacy of the Indian-law canons over the general tax-exemption maxim inheres regardless of whether the claimed exemption is from federal taxation or from state taxation.[8]

Lastly, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), provides yet another example of this Court construing an ambiguous federal statutory provision broadly in favor of Indian interests to recognize a tax exemption, the general tax-exemption maxim notwithstanding. There, this Court construed 25 U.S.C. § 465's exception from *ad valorem* property taxation on "lands, interests in lands, water rights and surface rights" to encompass an exemption from a use tax on personal property that was later attached to the land.[9]

8. See also the exemption-from-state-taxation case *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-56 (1973), where this Court invoked *Squire* as if it were fully interchangeable with this Court's federal-authorization-of-state-taxation case law.

9. In so doing, this Court expressly acknowledged that a property tax and a use tax on personalty later attached to real property were two different things. *E.g.*, *id.* at 158 ("This is not to say that use taxes are for all purposes deemed simple ad valorem property taxes.").

Even though an exemption for use taxes was not unambiguously provided for in the statute, this Court unequivocally indicated that its finding of an exemption was based on statutory construction that resulted in an outcome favorable to Indian interests:

> . . . [U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter from state taxation must be **construed** to encompass an exemption for the former.

411 U.S. at 158 (emphasis added).

From those opinions of this Court, a constant theme emerges spanning almost a century. When actual textual ambiguity exists concerning a possible tax exemption benefitting Indians, broad construction in favor of the Indians' interests occurs, the general tax-exemption maxim notwithstanding.

D. NO DECISION OF THIS COURT HAS CONSTRUED A GENUINE TEXTUAL STATUTORY AMBIGUITY CONCERNING A POTENTIAL INDIAN TAX EXEMPTION IN A MANNER AGAINST INDIAN INTERESTS.

A careful examination of the Indian-law-related cases in which this Court has merely declined to infer a tax exemption *from pure policy untethered to statutory text* is particularly germane to the issue in this case. Such a review demonstrates that no decision of this Court has held in a case of *actual textual ambiguity* concerning exemption from taxation for Indians that, because of the absence of a textual "plain statement" of the tax exemption, the ambiguity must be construed narrowly against the Indians and in favor of their guardian, the Government. In other words, when an

actual textual ambiguity has existed, this Court has not superseded the Indian-law canons with the general tax-exemption maxim to the Indians' detriment.[10]

In this Court's Indian-law decisions involving tax exemptions, treatment and result differ significantly between those cases in which this Court has recognized the existence of an actual textual ambiguity and those cases in which no such ambiguity was found. When this Court has found an actual ambiguity, and thus had to engage in construction, this Court has applied the Indian-law statutory-ambiguity canon to construe the ambiguity in favor of the particular tax exemption for Indian interests.[11] On the other hand, when no actual ambiguity was found, and hence nothing existed to construe by application of the Indian-law canons, this Court has routinely announced that exemptions cannot be "implied" [from pure policy untethered to statutory text].

The earliest in this sequence of cases, *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), cited to this Court by the Government in its response in this case, *see* Br. for the United States at 12, involved no actual textual ambiguity, hence no holding arose as to the role of the general tax-exemption maxim in light of the Indian-law statutory-ambiguity canon when actual textual Indian-law tax-exemption ambiguity exits. In that case, Congress applied certain taxes to "articles produced anywhere within the

10. This Court has recently indicated in a treaty case that the Indian-law canon requiring ambiguities to be construed in favor of Indian interests also supersedes a general presumption about the legality of executive action. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999). That same reasoning is consistent with affording to the Indian-law canons pride of place in the tax-exemption context.

11. *E.g.*, *Montana Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Choate v. Trapp*, 224 U.S. 665 (1912).

exterior boundaries of the United States, whether . . . within a collection district or not." Act of July 20, 1868, ch. 186, § 107, 15 Stat. 167. The tobacco of the Cherokee Respondents was seized for failure to bear federal tax stamps. The Indians noted that the Indian Territory was not within any revenue collection district of the United States, and argued that Congress had not intended to apply the 1868 statute in the Indian Territory. This Court held that the tax applied. In finding the statute unambiguous (and therefore presenting nothing for construction), the mention of the general tax-exemption maxim revealed itself simply as general *dictum* that a tax exemption cannot be implied from pure policy:

> **The language of the section is as clear and explicit as could be employed**. It embraces **indisputably** the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exception had been intended it would doubtless have been expressed. **There being no ambiguity, there is no room for construction.** It would be out of place. The section must be held to mean what the **language imports.** When a statute is **clear and imperative,** reasoning *ab inconvenienti* is of no avail. It is the duty of the courts to execute it. Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. . . .

The Cherokee Tobacco, 78 U.S. (11 Wall.) at 620 (emphasis added) (citations omitted).

In *Choteau v. Burnet*, 283 U.S. 691 (1931), also invoked previously by the Government, *see* Br. for the United States at 10, 11, 12, again this Court found no actual textual Indian-law statutory ambiguity on which to base a holding as to the relative weight of the general tax-exemption maxim

vis-a-vis that of the Indian-law canons of construction. There, Choteau, an emancipated Osage Indian, claimed that his "headright" income was exempt from federal income taxation for two reasons. Neither assertion was based on an actual statutory ambiguity. *Choteau's* first basis, that he was "exempt because of his status as an Indian," *id.* at 694, was based only on policy, as this Court expressly noted, *id.* ("The assertion requires a reference to the policy of the government with respect to Indians."). Additionally, Choteau asserted that his income came from an "exempt source" – royalties that prior to distribution were held by the Government in trust for the tribe. *Id.* at 696.

In rejecting the "exempt source" assertion, this Court pointed to absolutely no statute, much less any statutory ambiguity that required construction. Instead, this Court focused entirely on the now-obsolete "instrumentality" doctrine. *See id.* at 696-97. Thus, while the *Choteau* Court did quote the general tax-exemption maxim in the "exempt source" portion of its opinion, other than insofar as that maxim precludes the implication of tax exemptions from pure policy untethered to statutory text, that maxim had nothing to do with the actual resolution of the "exempt source" issue – or for that matter, with the resolution of anything else in the case.[12] As in *The Cherokee Tobacco*, the *dictum*

12. Nor do any of the cases *cited* in the relevant section of *Choteau* involve an actual Indian-law statutory textual ambiguity, much less hold that in such an instance the actual ambiguity must be construed against the Indians to the benefit of the federal government because the general tax-exemption maxim somehow supersedes the Indian-law canons. In *Heiner v. Colonial Trust Co.*, 275 U.S. 232 (1927), this Court considered whether a non-Indian oil and gas lessee of Osage mineral interests was exempt from federal income tax. The non-Indian raised the then-operative, constitutionally-based "federal instrumentality" doctrine. This Court rejected that argument by noting that the "federal-instrumentality" doctrine could not even then bind

(Cont'd)

concerning the general tax-exemption maxim arose in *Choteau* from no ambiguity, much less from the construction of an Indian-law statutory ambiguity.

Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, 295 U.S. 418 (1935), also cited by the Government at the Petition stage, *see* Br. of the United States at 10, 12, does not hold that in the case of an actual, textual Indian-law statutory ambiguity, on which Indians claim a tax exemption, the general tax-exemption maxim requires that the ambiguity be construed

(Cont'd)
Congress with respect to the imposition of a federal tax, and then found that the text of the Revenue Act of 1916 provided compelling evidence that Congress meant what it said (and hence no ambiguity existed). *Id.* at 234-35. This Court went on to reject an assertion, based on the policy that Indians are impliedly exempt from income tax, that non-Indian lessees of Indians are also exempt. *Id.* at 235. No ambiguity was found. No construction occurred. The Indian-law canons were not mentioned. The mention of the general tax-exemption maxim therefore was simply *dictum*.

Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928), is for present purposes no different than *Heiner*. In *Shaw*, an oil company asserted a "federal instrumentality" exemption from state gross-production taxes on land that was purchased for a restricted Indian with proceeds from royalties of a lease of his restricted allotment lands. This Court rejected the exemption. In so doing, this Court found no Indian-related statute ambiguous, engaged in no statutory construction, and did not mention the Indian-law canons of construction. Consistent with the absence of an ambiguity, this Court found the statutory authority for taxation clear:

> The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but section 4 *expressly subjects lands from which restrictions have been removed to state taxation.*

Id. at 581 (emphasis added).

in favor of the Government and against Indian interests. There, funds derived from the restricted allotment of a Creek Indian were invested, with the proceeds held in trust for the Indian by the Superintendent under the direction of the Secretary of the Interior. This Court held those proceeds subject to federal income tax. There was no finding that any statutory provision on which the claimed tax exemption was based was ambiguous. In fact, this Court first found that the Revenue Act of 1928 was *unambiguous*, *id.* at 420 ("The terms of the 1928 Revenue Act are very broad, and nothing there indicates Indians are to be excepted."), then emphasized the absence of ambiguity in such a way as to make its quotation of the *Choteau dictum*, *see Superintendent*, 295 U.S. at 420 (quoting *Choteau*, 283 U.S. at 693), only *dictum* yet again.

The *Superintendent* Court then addressed two statutes[13] cited to it as potential sources of the Indian's *income* tax exemption. This Court unequivocally found that the 1906 statutory exemption "related to *land* and not to income derived from investment of surplus *income from land*." *Id.* at 421 (emphasis added). Likewise, the 1908 statute was functionally identical. *See id.* Simply put, there was no actual textual statutory ambiguity to construe, hence no construction, and therefore no holding that such an actual ambiguity would be construed narrowly against the Indians' claim of a tax exemption and in favor of the government. Consistent with prior decisions of this Court in which no Indian-law statutory ambiguity was found, the Indian-law canon was not mentioned.

Finally, *Mescelaro Apache Tribe v. Jones*, 411 U.S. 145 (1973),[14] likewise does not hold that in the construction of an

13. Act of April 26, 1906, § 19, 34 Stat. 137; Act of May 27, 1908, § 4, 35 Stat. 312.

14. *Mescalero Apache* was decided the same day as *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), a case with which *Mescalero Apache* should be read *in pari materia*. The implications of *McClanahan* are discussed in substantial detail above. *Supra* at 19-20.

actual federal statutory ambiguity concerning a tax exemption for Indians the general tax-exemption maxim supersedes the Indian-law canons. In *Mescalero Apache*, the tribe sought to exempt income from its off-reservation ski resort from a state gross receipts tax. Once again without construction of any federal statutory ambiguity, the *Mescalero Apache* Court rejected the assertion that an exemption from that tax should be implied from pure policy – which was exactly what the tribe's first argument (based on the long-defunct federal instrumentality doctrine, *see id.* at 154-55) essentially sought.

This Court then went on to address the tribe's second basis for the claimed exemption from the gross receipts tax, Section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985 (codified at 25 U.S.C. § 465 (1970)). Although the *Mescalero Apache* Court mentioned the general tax-exemption maxim in that context, *see* 411 U.S. at 156, it made clear that no textual ambiguity existed:

> On the face of § 465, therefore, there is no reason to hold that it forbids income as well as property taxes.

Id. at 157.

As the above-discussed decisions demonstrate, this Court has not used the general tax-exemption maxim to supersede the Indian-law statutory-ambiguity canon in the construction of an actual textual ambiguity. Rather, that general maxim has been mentioned in Indian-law-related cases only as *dicta* when this Court acknowledged the impropriety of inferring a tax exemption from pure policy untethered to statutory ambiguity.

PROPOSITION TWO

APPLICATION OF THE APPOSITE PRINCIPLES OF CONSTRUCTION RESULTS IN THE CONCLUSION THAT 25 U.S.C. § 2719(d)(1) CREATES AN EXEMPTION FOR INDIAN TRIBES FROM THE FEDERAL WAGERING (AND RELATED OCCUPATIONAL) TAXES THAT IS IDENTICAL TO THE EXEMPTION ENJOYED BY STATES UNDER CHAPTER 35 OF THE INTERNAL REVENUE CODE.

A. 25 U.S.C. § 2719(d)(1) IS FACIALLY AMBIGUOUS.

The ambiguity of 25 U.S.C. § 2719(d)(1) is patent. On the one hand, Congress may have focused its application of the Internal Revenue Code on provisions "concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." But on the other hand, Congress expressly included in its identification IRC provisions § 6050I and Chapter 35 of the IRC, neither of which have anything to do with the reporting and withholding of taxes with respect to winnings. *Chickasaw*, 208 F.3d at 883; *Little Six*, 210 F.3d at 1365. Instead, Chapter 35 establishes the wagering (and related occupational) taxes – and the exemptions for states from those taxes – to which the Petitioners claim entitlement here.

The ambiguity created by that conflicting statutory language has been recognized directly by two opposing sets of appellate judges within one circuit, and at least implicitly by another circuit.[15] No appellate court addressing the

15. *Little Six, Inc. v. United States*, 210 F.3d 1361, 1365 (Fed. Cir. 2000) ("In view of the inconsistency between the statute's reference to winnings and its reference to section 6060I and Chapter 35 of the Internal Revenue Code, we conclude that the language in section 2719(d)(1) is **ambiguous**" (emphasis added)); *Little Six, Inc. v.* (Cont'd)

statutory language has pronounced it clear and unambiguous. That facial ambiguity inheres in § 2719(d)(1) is beyond legitimate doubt.

B. THE LEGISLATIVE HISTORY OF IGRA THAT IS SPECIFICALLY RELEVANT TO THE TAX EXEMPTION ISSUE RAISED BY 25 U.S.C. § 2719(d)(1) DOES NOT CLEARLY RESOLVE THAT ISSUE AGAINST INDIAN TRIBES.

The judicially-recognized statutory ambiguity described above persists even after review of the legislative history.[16] What ultimately became IGRA originated as H.R. 1920, 99th Cong. (1986), which was passed by the House of Representatives in 1986. The Senate did not adopt the bill prior to the end of the 99th Congress. H.R. 1920 contained only one section that addressed taxation:

> Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall

(Cont'd)
United States, 229 F.3d 1383, 1384 (Dyk, J., dissenting from denial of rehearing) ("Despite the government's efforts, **there is no way to reconcile** § 2719(d)(1)'s literal limitation to provisions of the Internal Revenue Code 'concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations' with its parenthetical reference to Chapter 35" (emphasis added)); *Chickasaw*, 208 F.3d at 871 (10th Cir. 2000) ("Although it is true that § 2719(d)(1)'s reference to Chapter 35 is somewhat **cryptic** . . ." (emphasis added)).

16. In *Rice v. Rehner*, 463 U.S. 713, 733 (1983), this Court indicated that the Indian-law canons of construction are not to be employed when Congressional intent against the Indians' interest is clear from the face of the statute and its legislative history. Here, the face of the statute and the legislative history do not clearly demonstrate that the construction of § 2719(d)(1) proffered by the Petitioner Nations is incorrect.

> apply to the operations in accordance with the Indian Gaming Regulatory Act the same as they apply to State operations.

H.R. 1920, § 4, 99th Cong. (1986).

In commentary on that section, the House Committee Report for H.R. 1920 expressly identified two portions of the IRC, 26 U.S.C. § 3402(q) (1994) (which involves only reporting and withholding of taxes related to the operation of gaming activities), and Chapter 35 (which both authorizes the taxes and creates the state gaming exemption from them at issue here). That Report stated:

> Section 4 provides that related provisions of the Internal Revenue Code, such as section 3402(q) and Chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.

H.R. Rep. No. 99-488, at 13 (1986).

The floor debate on H.R. 1920 contained nothing on the matter of federal taxes or exemption from them.

In the 100th Congress, the Senate considered S. 555, 100th Cong. (1987), which ultimately became IGRA. Section 20(d) of S. 555, 100th Cong. (Feb. 19, 1987), initially contained the same general language about taxation that had been included in Section 4 of H.R. 1920.

During the Senate's consideration of S. 555, the more specific language at issue here, including the reference to IRC Chapter 35 contained in H.R. Rep. No. 99-488, at 13, was substituted for the phrase that included the general reference to "taxation." Section 20(d) of S. 555, 100th Cong.

(1987) (which ultimately was enacted as what is now 25 U.S.C. § 2719(d)) was modified to provide:

> **(d) Application of the Internal Revenue Code of 1986.**
>
> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and Chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gambling or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

The expressly-identified IRC §§ 1441, 3402(q) and 6041 do concern the reporting and withholding of taxes with respect to winnings (by a person other than the gaming operator) from gaming or wagering operations. However, the last two specifically-identified IRC components, § 6050I and Chapter 35, have nothing to do with the reporting and withholding of taxes with respect to such winnings by a non-operator.[17] Chapter 35, on which this controversy centers, imposes on the tribal gaming operator the taxes in dispute here[18] and, among other items, creates an exemption from those taxes in favor of state gaming operators.[19]

The only committee report that accompanied what ultimately became IGRA is silent on § 2719(d)(1)'s reference to IRC § 6050I and Chapter 35. In its "section by section

17. *Chickasaw*, 208 F.3d at 883; *Little Six*, 210 F.3d at 1365.

18. 26 U.S.C. §§ 4401, 4411 (1994) (App. 91a, 94a).

19. 26 U.S.C. § 4402 (1994) (App. 92a).

analysis," the Senate Report merely states that Section 20(a)-(d):

> Sets forth policies with respect to lands acquired in trust after enactment of this act and applies the Internal Revenue Code to winnings from Indian gaming operations.

S. Rep. No. 100-446, 100th Cong., at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090.

Nothing in that Committee Report clearly indicates that the tax exemption enjoyed by states was to be unavailable to the Indian tribes conducting the same activity as states to provide revenue for governmental purposes, nor is there an indication to the contrary. Likewise, the debate on IGRA on the floors of the Senate and the House of Representatives contain no mention of the question of federal taxation.

The unexplained changes in S. 555 as it moved through the legislative process are also inconclusive. While S. 555 initially contained a general reference to "taxation," the specific reference to the exemption-containing IRC Chapter 35 was substituted for that general provision. That substitution of the specific for the general renders inapplicable the sometimes-employed rule that a deletion of express language in an earlier draft (when replaced with nothing) is some evidence that Congress did not intend a result consistent with that deleted language.[20] Here, however,

20. As a general principle, deletion of express language from an earlier draft, by itself, provides some evidence that Congress did not intend as a result the deleted provision. However, it is the application of that principle that is important. For example, in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), cited by the Government to this Court in material respect at the Petition stage, *see* Br. for the United States at 8, the critical passage (making a refugee ineligible for asylum unless his deportation or return would be prohibited by a particular section of

(Cont'd)

the *substitution* of the specific exemption-containing IRC Chapter 35 for the general term "taxation" is not simply a deletion, but can be viewed as merely a different way of indicating the same result.[21]

At the end of the review of the legislative history one fact remains. That history does not clearly demonstrate Congress' intent – one way or another – as to whether Indian tribes engaged in gaming pursuant to IGRA shall be precluded from the Chapter 35 tax exemption provided to states engaged in similar activity. Without such a clear indication of Congressional intent from the face of the statute and its legislative history, the ambiguity remains and requires construction for resolution.[22]

(Cont'd)

the Immigration and Nationality Act) was replaced with nothing, thus giving rise to this Court's statement that "Congress does not intend *sub silentio* to enact . . ." 480 U.S. at 442-43. That same replacement with nothing occurred in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-53 n.9 (1973), also earlier relied upon by the Government, *see* Br. for the United States at 8. The "deletion" principle should have no application here, since the phrase containing the general reference to "taxation" in the earlier version of S. 555 was replaced with the specific reference to the exemption-containing Chapter 35, thus precluding any conclusion premised on mere deletion.

21. In at least one Indian-law case, *Oklahoma Tax Comm'n v. Barnsdall Refineries, Inc.*, 296 U.S. 521 (1936), even the *deletion* of language from the final draft of a statute was not dispositive. There, this Court disregarded the deletion of the critical word "now" (which had been stricken from the final version of the bill as enacted), and adopted a construction giving application to that stricken word for the benefit of the lessee of Indian lands. *Id.* at 523-25.

22. This Court has not indicated that application of the Indian-law canons can be avoided by *seriatim* resort to legislative history at ever-increasing levels of remoteness to resolve virtually any textual ambiguity. If such were the case, then (since the Indian-law canons

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C. 25 U.S.C. § 2719(d)(1) SHOULD THEREFORE BE CONSTRUED AS EXTENDING THE WAGERING (AND RELATED OCCUPATIONAL) TAX EXEMPTIONS ENJOYED BY STATES UNDER IRC CHAPTER 35 TO TRIBAL GOVERNMENTAL GAMING OPERATIONS.

In this case, application of the deeply-rooted principle expressed in the eminently sound and vital Indian-law statutory-ambiguity canon discussed above to the facially ambiguous 25 U.S.C. § 2719(d)(1) can yield only one result, in light of the legislative history's inability to provide clear

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operate solely in the presence of ambiguity) "continued vitality" would be merely semantic since not only could they not control the outcome of any litigation, but also they could never even theoretically *apply*. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), to which the Government referred this Court at the Petition stage, *see* Br. for the United States at 13, certainly does not support such a canon-destroying view. In *Cotton Petroleum*, this Court took great pains to re-emphasize the canons' continued vitality. *See* 490 U.S. at 177 ("[A]mbiguities in federal law are, as a rule, resolved in favor of tribal independence."); *id.* ("[E]ven when [the relevant Congressional reports are] considered *(in their broadest possible terms* . . . (emphasis added)); *id.* at 179 (same); *id.* at 186 (same). Moreover, the tribe in *Cotton Petroleum* sought to ground an exemption on a statute that was utterly silent about the matter, unlike here, where the statute is textually ambiguous. While the Petitioners in no measure deny the potential force of dispositive legislative history in appropriate cases, *Cotton Petroleum* does not support an Indian-law-canon-evading "keep reviewing the legislative history until something moves the issue off equipoise" approach to resolving federal statutory ambiguities affecting Indian Tribes. *Hagen v. Utah*, 510 U.S. 399 (1994), and *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), also invoked by the Government at the Petition stage, *see* Br. for the United States at 13, are also subject to similar observations. In short, for the Indian-law canons to have actual vitality, they must at some point meaningfully be controlling. *Cotton Petroleum*, *Hagen* and *Klamath* in no way impeach that conclusion.

resolution against the Petitioners' interests. That section's express inclusion of IRC Chapter 35 (which has absolutely nothing to do with the reporting and withholding of taxes with respect to winnings) must be construed liberally in favor of the Nations for their benefit, by making available to governmental-gaming tribes the same tax exemption provided by IRC Chapter 35 to states engaged in governmental gaming activity.

Failure to apply the Indian-law canons of construction in this case would cause multiple deleterious consequences. First, such a failure would violate the Congressional intent suggested by IGRA's specific legislative history – that the Indian-law canons be used to resolve ambiguities in that Act.

Second, such a failure could herald the practical death of that "eminently sound and vital canon." This Court has applied the canons to statutes far less ambiguous than § 2719(d)(1). *See McClanahan*, 411 U.S. at 175-76. If statutes that did not contain the patent ambiguity present here triggered application of the Indian-law canons, and were this Court now to determine that the more ambiguous § 2719(d)(1) did not trigger their force even absent dispositive legislative history, then the real conclusion would inevitably be that the Indian-law canons were no longer "eminently sound and vital." Either the statutory-ambiguity canon, which contains no qualification as to its application, retains pride of place as a tool of construction of Indian-related statutes whose ambiguity is unresolved by clear legislative history, or it does not. If no longer preeminent, this canon would become completely ineffectual because a clever reason to avoid its application by elevation of another rule (or reference to increasingly creative interpretations of increasingly remote legislative history) could always be advanced.

Third, a failure to apply the Indian-law statutory-ambiguity canon to the admittedly ambiguous § 2719(d)(1) would constitute a judicially-driven change in fundamental federal Indian policy without clear, supporting Congressional direction. The statutory-ambiguity canon is "rooted in the unique trust relationship between the U.S. and the Indians." *See County of Oneida*, 470 U.S. at 247-48. The Petitioners respectfully suggest that no Congressional action authorizes a judicial articulation of such a radical change in federal Indian policy.

At the end of the day the choice is clear: either the Indian-law statutory-ambiguity canon still remains vital as the dispositive tool to resolve an obvious textual ambiguity in an Indian-law-related statute when such ambiguity is not *clearly* resolved against tribal interests by legislative history, or it does not. No legitimate reason exists to deprive the Indian-law statutory-ambiguity canon of that vitality.

PROPOSITION THREE

THE CONSTRUCTION OF § 2719(d)(1) IN FAVOR OF THE TAX EXEMPTION FOR THE PETITIONER NATIONS IS CONSISTENT WITH AND MATERIALLY ADVANCES IMPORTANT FEDERAL INDIAN POLICIES EMBODIED IN IGRA.

Application of the Indian-law statutory-ambiguity canon results in a construction of § 2719(d)(1) that is consistent with the federal Indian policy embodied in IGRA. The background of Indian governmental gaming explained by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987),[23] the Senate Committee Report accompanying IGRA, and the express language of IGRA all

23. In *Cabazon Band*, this Court expressly recognized the "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development" in the specific tribal-gaming context. 480 U.S. at 216.

resonate the same federal Indian policy. Tribal gaming is "governmental gaming, the purpose of which is to raise tribal revenues for member services." S. Rep. No. 100-446, 100th Cong., at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082. Specifically, Congress' central purpose in enacting IGRA was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . ." 25 U.S.C. § 2702(1) (1994). Gaming pursuant to IGRA advances that purpose by providing tribal governments with a method of funding those governmental needs, while breaking the cycle of dependency on federal appropriations. In discussing tribal gaming operations, the Senate Committee concluded that "for those tribes that have entered into the business of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." S. Rep. No. 100-466 at 2-3, 100th Cong. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072. The tribal tax exemption resulting from the application of the Indian-law canons to § 2719(d)(1)'s ambiguity would make more money available to assist the tribal governments in meeting their citizens' needs, and would thereby assist in breaking that cycle of dependency on Congressional appropriations.[24]

Application of the Indian-law statutory-ambiguity canon also results in a construction of § 2719(d)(1) consistent with the legislative indication that tribal governmental gaming under IGRA to raise revenue for governmental purposes is the same as governmental gaming conducted by state

24. *See also Cabazon Band*, 480 U.S. at 217 n.20 (quoting President Reagan's 1983 Statement on Indian Policy, which provided in pertinent part that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." (citation omitted)).

competitors of tribes for identical purposes. No serious doubt can exist that at the time of IGRA's enactment, various states were engaged in gaming operations to provide governmental services to their citizens. The Senate Committee expressly noted that tribal governments, like state governments, were using gaming to provide governmental services to their citizens:

> Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible.

S. Rep. No. 100-446 at 2, 100th Cong. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072.

That Senate Committee Report's observation is clearly consistent with an intent that Indian tribes using gaming to meet governmental responsibilities be viewed as engaging in the same type of governmentally-sponsored activity, to generate the same type of revenue and to provide the same type of governmental service as their state government competitors. Tribes, therefore, should not be treated less favorably by the federal government than those state competitors. The construction resulting from the Indian-law statutory-ambiguity canon places tribal governmental gaming on the same tax footing as state governmental gaming.

Application of the Indian-law statutory-ambiguity canon also further results in a construction of § 2719(d)(1) consistent with the interpretation of it by the primary author of IGRA, Senator Daniel Inouye, the Chair of the Senate Select Committee on Indian Affairs. In response to proposals by the IRS to attempt collection of Chapter 35 taxes from

Indian tribes, Chairman Inouye wrote to the IRS Commissioner:

> As primary author of the Indian Gaming Regulatory Act, I write to advise you that it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code. Because the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of the Congress that to impose a higher rate upon tribal government-conducted gaming activities would be unfair. Accordingly, it was this result that the Congress intended to avoid by including reference to Chapter 35, and stating that, "[t]he provisions of the Internal Revenue Code of 1986 (including . . . chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act . . . in the same manner as such provisions apply to State gaming and wagering operations."

Letter from Sen. Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs, to Hon. Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service, Dec. 12, 1991. (App. p. 112a)

Senator Inouye's remarks should be given weight for several reasons. First, whether the remarks of the legislative sponsor were made before passage of a bill or after passage is not outcome determinative of their value to this Court. Rather, it is the status of the Senator, as the legislator chiefly responsible for guiding the act in question into enactment, that gives weight. In *Menominne Tribe v. United States*, 391 U.S. 404 (1968), this Court expressly relied on a post-passage statement of the legislative sponsor to bolster its conclusion

as to the effect of an Indian-related federal statute. *See id.* at 413 ("Our conclusion is buttressed by the remark of the legislator chiefly responsible for guiding the termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it . . ."). Senator Inouye fulfilled that role here as the legislator chiefly responsible for guiding IGRA to enactment. His post-passage remarks deserve weight here, just as did Senator Watkins' post-passage remarks in *Menominne Tribe*.

Further, the Chairman's explanation was timely. The Petitioner Nations do not expect the Government to dispute that Senator Inouye promptly wrote to the IRS Commissioner when the IRS first disclosed its intention (after at least a decade of Indian gaming) to attempt to collect Chapter 35 taxes on Indian gaming. The Chairman's letter was not a recounting of ancient history by a back-bench legislator who had merely cast a vote decades earlier on a bill in which he had no meaningful involvement.

Finally, a more clear, authoritative and timely statement of the Congressional purpose for the substitution of the reference to IRC Chapter 35 for the phrase including "taxation" in 25 U.S.C. § 2917(d)(1) than Chairman Inouye's letter does not exist. The Senate Committee Report on IGRA and the floor debate in Congress are both silent on this subject.[25] At the very minimum, Senator Inouye's

25. Petitioners are aware that in circumstances substantially different from those here, this Court has declined to give weight to post-passage statements of legislators. In *Weinberger v. Rossi*, 456 U.S. 25 (1982), this Court found insufficient to establish the kind of affirmative Congressional expression of an intent to abrogate provisions in thirteen international agreements "one isolated remark by a single Senator, ambiguous in meaning when examined in context . . .", *id.* at 35. Here, the Chairman's letter to the IRS Commissioner is far from ambiguous in meaning when examined in context. In *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), (Cont'd)

explanation, consistent with the *Little Six* Opinion, reinforces the possible construction of § 2719(d)(1) as providing the same tax exemptions for tribal governmental gaming as are afforded to state governmental gaming by IRC Chapter 35. That "possible construction" of the ambiguity in favor of tribal interests requires the Petitioner Nations to prevail. *See County of Yakima*, 411 U.S. at 174.

CONCLUSION

The Petitioner Nations request this Court to determine that 25 U.S.C. § 2719(d)(1) is ambiguous, to apply the Indian-law statutory-ambiguity canon of construction to that ambiguity, to construe that ambiguity liberally in favor of the availability of the tax exemption contained in IRC Chapter 35 to Indian tribes, to reverse the judgments of the Tenth Circuit against the Petitioners, and to remand this matter to that Court for the entry of judgments against the Government on its claims for wagering taxes against the Petitioner Nations and in favor of their claims for refunds and ancillary relief sought in the District Court.

(Cont'd)
this Court rejected the comments of a Congressman who did not sponsor the bill in question, but authored another bill, with different critical provisions that were not adopted. *See id.* at 118. Here, Senator Inouye was IGRA's primary author and sponsor. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), a case in which the reports of both Houses and statements of other members of Congress refuted a statutory interpretation consistent with the remarks of the sponsor, *id.* at 311, this Court explained that such remarks of a sponsor are not controlling in analyzing legislative history. But here, in contrast, nothing in the Senate Report or the statement of any other member of Congress refutes the Chairman's explanation. Finally, in *TVA v. Hill*, 437 U.S. 153 (1978), this Court recognized that such a statement could not serve to change the legislative intent of Congress expressed before the Act's passage. *See id.* at 193. Here, no such clear statement of pre-passage legislative intent of Congress's inclusion of Chapter 35 in § 2719(d)(1) exists, much less is sought to be changed by the Chairman's explanation.

Respectfully submitted,

GRAYDON DEAN LUTHEY, JR.
Counsel of Record
STEPHEN W. RAY
KERI G. WILLIAMS
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue
Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

BOB W. RABON
RABON, WOLF & RABON
402 East Jackson
P.O. Box 726
Hugo, OK 74743
(580) 326-6427

DENNIS W. ARROW
OKLAHOMA CITY
UNIVERSITY SCHOOL
OF LAW
2501 North Blackwelder
Oklahoma City, OK 73106
(405) 521-5179

Attorneys for Petitioners